No. 89-912

In The

Supreme Court of the United States

October Term, 1989

BETH BABCOCK, by and through her guardian; ERIKA BABCOCK; and ANGELA LONG,

Petitioners,

v.

WANDA TYLER and MARK BRONSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Petitioners in this civil rights damage action are three girls who were in the custody of the Washington Department of Social and Health Services (DSHS), having been placed after a juvenile court dependency finding. They sued their two state caseworkers after Lee Michael, the man in whose home they were placed, raped and assaulted them for at least fifteen months. They charged that the first caseworker, respondent Wanda Tyler, had conducted a constitutionally inadequate investigation of Michael and placed them in a dangerous environment. They asserted that the second caseworker, respondent Mark Bronson, failed to protect them from abuse while they resided in the home.

The Ninth Circuit ruled that caseworkers have absolute "quasi-judicial" or "quasi-prosecutorial" immunity for all actions which they take with respect to dependent children in state custody. It did not reach the merits of petitioners' claims.

In response to the girls' petition to this Court, challenging the expansion of absolute immunity as conflicting with this Court's decisions limiting absolute immunity and exacerbating a conflict between the circuits on the extent of caseworker immunity, respondents argue that the Ninth Circuit has not created a new form of absolute immunity, that the circuits are not in conflict, and that the children were not in state custody. This brief is written in reply to those contentions.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents' assertions as to respondent Tyler's conduct are misleading and inaccurate. For example, respondents have attempted to justify Tyler's failure to investigate Lee Michael's criminal record by asserting that state law did not require her to do so. (Brief in opposition, p. 4) They made no such claim in either the District Court or the Ninth Circuit. Moreover, the record does not support that excuse. Wanda Tyler has never stated that she failed to explore Michael's criminal record because state law did not require it. On the contrary, when pressed, she conceded that she had no reason for failing to make the inquiry, even though a question concerning criminal arrests was on her checklist. (Deposition of Wanda Tyler).

Second, the Washington statute cited by respondents which prohibits private individuals from examining other private individuals' criminal records, (Brief in opposition, p. 4), does not explicitly prohibit one state agency from checking the records of another state agency. It also provides no defense to respondent Tyler for failing to question Michael about his criminal record or to ask him for a release to examine that record.

Third, while excusing Lee Michael because one rape charge ended in an acquittal and the other in a dismissal (Brief in opposition, pp. 3-4), respondents overlook their admission that if respondent Tyler had known about Michael's criminal history, including not only the disposition of those two charges but also numerous other charges which resulted in felony and misdemeanor convictions, she would *not* have placed the three girls in his home.

(Response to Request for Admission No. 17) Indeed, public court records, easily available to respondents, showed that Michael successfully raised the defense of lack of penetration to the charge that he raped an elderly woman. He admitted to engaging in other sexual behavior with her, short of actual intercourse. Moreover, the record shows that the attempted rape and assault charges, from the second incident, were dismissed because the victim, a friend of Michael's wife, was too terrified of Michael to press charges. Under the standard enunciated by this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982), the issue of whether a caseworker acting within the bounds of "accepted professional judgment" would place three young girls in the home of such a man is properly reserved for trial.

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

Relying upon the "undisputed fact" that "all of the defendant's actions of which plaintiffs complain were taken during the course of dependency proceedings," (Appendix to petition for certiorari, p. 10), i.e., while dependency proceedings were pending in the juvenile court, the court below held that the respondent caseworkers were entitled to absolute immunity for "fulfilling their post-adjudicative duties," which "may or may not be prosecutorial in nature." (App. 14) In doing so, the court below greatly broadened absolute immunity, creating a new type of caseworker immunity. The court then

extended that immunity to the caseworkers' post-adjudicative, non-prosecutorial actions in investigating prospective foster parents and monitoring the safety of children in state custody. That holding conflicts with decisions of this Court and of other circuits.

This Court has consistently evaluated claims to absolute immunity based upon function, not job title. *Forrester v. White*, 484 U.S. 219 (1988). Thus, while prosecutors have absolute immunity for initiating and conducting prosecutions, *Imbler v. Pachtman*, 424 U.S. 409 (1976), prosecutors, including the Attorney General, have only qualified immunity for conducting investigations. *Mitchell v. Forsyth*, 472 U.S. 519 (1985). The fact that caseworkers desire absolute immunity "to permit them to perform their duties without fear of even the threat of §1983 litigation," (App. 15) is irrelevant to the analysis. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In their Brief in Opposition, respondents do not dispute this Court's analysis of absolute immunity. Instead, first, by adding to the facts upon which the court below relied, and second, by constricting the holding of the court below, respondents' brief defends a much narrower ruling than that which the court below actually issued.

First, citing to an opinion of the Washington Supreme Court, respondents repeatedly assert that the parties had a full opportunity to litigate the issue of whether the children should be placed in the Michael home. (Brief in opposition, pp. 6, 7, 9, 10) Therefore, they claim, that placement not only occurred during the course of the dependency proceedings, as the court below found, but

was "intimately associated with the judicial process." (Brief in opposition, p. 10)

As a preliminary matter, it should be noted that that assertion, even if true, is immaterial to respondent Bronson. The validity of an initial placement does not immunize the caseworker for subsequently failing to protect the child from abuse, any more than a valid arrest warrant immunizes a jailer from liability for failing to protect a pre-trial detainee.

More importantly, respondents' assertion is simply untrue, and their reliance upon *Babcock v. State*, 112 Wn.2d 83, 768 P.2d 481 (1989), is inappropriate in light of the fact that the Washington Supreme Court has granted reargument in that case, 113 Wn.2d ff 1104 (1989), thereby necessarily nullifying the prior decision. See, *In re Brown*, 6 Wash.2d 215, 101 P.2d 1003, 107 P.2d 1104 (1940). (The case was reargued on October 24, 1989, and no decision has yet been issued.)

Petitioners based their request for reargument in the Washington Supreme Court in large part upon the fact that that Court had fundamentally misunderstood the statutory nature of the review proceedings in the juvenile court. The Washington Supreme Court incorrectly found that the review hearings conducted under R.C.W. §13.34.130(3)(a) were disposition hearings under R.C.W. §13.34.110. Respondents, though they opposed the motion to reargue, acknowledged the factual mistake and conceded the true statutory nature of the juvenile court proceedings. When the Washington Supreme Court granted reargument en banc, it was thus aware of its

prior misunderstanding. Respondents therefore improperly rely upon a decision that contains a material undisputed factual error, and which is presently being reconsidered.

The court below did not base its expansion of immunity upon the parties' alleged opportunity to litigate Michael's fitness in the course of the dependency proceeding. On the contrary, recognizing that the review proceedings concerned "Rudolph Babcock['s] continued . . . efforts to regain custody of his daughters," (App. 6), the court based its holding solely upon the fact that dependency proceedings were pending at the time of the respondents' actions.

Second, by relying upon the juvenile court's supposed adjudication of Michael's fitness as a foster parent, the respondents narrow the holding of the court below in order to force that holding into the confines of this Court's decisions granting absolute immunity for actions taken by judges, prosecutors, and witnesses as part of the judicial process. (Brief in opposition, pp. 6-7)

Most of the circuits have followed this Court's functional approach in evaluating caseworkers' claims to absolute immunity in cases involving child abuse, neglect, or dependency. When the caseworker is conducting an investigation or performing a related function, most of the circuits have ruled that the caseworker has only good faith immunity. *Achterhof v. Selvaggio*, 886 F.2d 826 (6th Cir. 1989); *Vosburg v. Department of Social Services*, 884 F.2d 133, 138 (4th Cir. 1989); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1987); *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988); *Austin v. Borel*, 830 F.2d 1356 (5th Cir.

1987); *Robison v. Via*, 821 F.2d 913 (2nd Cir. 1987); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987).

On the other hand, when a caseworker or attorney engages in activities "that could be deemed prosecutorial," such as filing and prosecuting child abuse, neglect, or dependency proceedings in state court, several circuits have found the caseworker entitled to absolute immunity. *Vosburg v. Department of Social Services*, 884 F.2d 133, 138 (4th Cir. 1989); *Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154 (9th Cir. 1987); *Myers v Morris*, 810 F.2d 1437 (8th Cir. 1987); *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.) *cert. denied* 479 U.S. 828 (1986).

In addition to the court below, only the Sixth Circuit has afforded caseworkers absolute immunity for all functions they perform after a dependency proceeding has been filed. *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984).

In this case, petitioners have sued respondents for improperly performing two discrete functions: 1) selecting a foster home for three children in state custody; and 2) supervising and protecting those girls while they were in foster care. As the court below recognized, these functions are not adjudicatory; they are "post-adjudication duties." (App. 14) Nor are they prosecutorial.

Protecting children in state custody is a function of DSHS and its caseworkers. 42 U.S.C. §671(a)(10); R.C.W. §74.13.020(5); *Lipscomb v. Simmons*, 884 F.2d 1242 (9th Cir. 1989). Selecting a safe foster home for a child is similarly an agency function. As respondents stated in their brief to the Ninth Circuit, the DSHS had the right to place the

children in a home of its choice, and to move the children from one home to another without consulting the court. (Brief of Appellants Wanda Tyler and Mark Bronson to the United States Court of Appeals for the Ninth Circuit, p. 30); *In re Lowe*, 89 Wn.2d 824, 827, 576 P.2d 65, 67 (1978); *In re Gakin*, 22 Wn. App. 822, 592 P.2d 670, 671 (1979).

By incorrectly asserting that the court below based its holding upon the parties having litigated Michael's fitness to care for the petitioners, respondents incorrectly rely upon the line of cases which grant caseworkers absolute immunity for prosecuting child dependency proceedings. (Brief in opposition, pp. 7-9) In actuality, the court below afforded caseworkers immunity for all functions they perform, as long as they perform those functions while a juvenile court has jurisdiction over a dependency proceeding, a very broad holding which fails to distinguish caseworkers' prosecutorial functions from their investigatory and protective functions and thereby conflicts with decisions of other circuits.

II.

THE CHILDREN WERE IN STATE CUSTODY

Respondents make the astonishing assertion that "Petitioners were not in 'foster care' under Washington law" during the time that they were residing in the Michael home, implying that the children were in the legal custody of Lee and Janet Michael, rather than the legal custody of the state. (Brief in opposition, p. 3) Except for the semantic technicality that the Washington statutes do not use the term "foster care," that statement

is untrue. The children uncontrovertedly were in foster care as this Court used the term in *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1006 n. 9 (1989), i.e., they had been removed from their father "by the affirmative exercise of [state] power" and "placed in a foster home operated by [the state's] agents." *Id.*

Here, the state had removed the girls from their father through a dependency proceeding, taken them into its "care, custody, and control" upon a finding of dependency. (App. 26; see also petition, p. 5 and n. 1) As dependent children, their "legal custody reside[d] with the state." *In re Kevin L.*, 45 Wash. App. 489, 726 P.2d 479, 485 (Div. 2, 1986), (McInturff, J., concurring). DSHS paid Lee Michael to provide care for the girls. He was not even a party to the dependency proceeding. He was thus the agent of DSHS, not the girls' legal guardian or custodian.

CONCLUSION

In just the last three years there have been numerous court of appeals opinions on caseworker immunity, while prior to 1984 there were none. Some of these opinions are in conflict, and clear guidance from this Court is greatly needed. For all the aforementioned reasons, the petition should be granted.

Respectfully submitted,

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February 6, 1990